UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: August 2, 1991

FAA Order No. 91-30

In the Matter of:	Docket No. CP89WP0452
MARIA J. TRUJILLO	

DECISION AND ORDER

Complainant has appealed from the oral initial decision issued by Administrative Law Judge Edward C. Burch at the conclusion of the hearing held in this matter on February 26, 1991, in Phoenix, Arizona.[1/] In his initial decision, the law judge found that Respondent did not violate Section 107.21(a)(1) of the Federal Aviation Regulations (FAR) (14 C.F.R. § 107.21(a)(1)),[2/] as alleged in the complaint, when she attempted to enter a sterile area at Sky Harbor International Airport, Phoenix, Arizona, with an unloaded BB gun in her carry-on bag. The law judge found that, because the

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1/ A copy of the law judge's oral initial decision is attached.

2/ 14 C.F.R. § 107.21(a)(1) provides:

§ 107.21 - Carriage of an explosive, incendiary, or deadly or dangerous weapon.

(a) Except as provided in paragraph (b) of this section, no person may have an explosive, incendiary, or deadly or dangerous weapon on or about the individual's person or accessible property --

(1) When performance has begun of the inspection of the individual's person or accessible property before entering a sterile area[.]

gun was inoperable, it was not a deadly or dangerous weapon within the meaning of Section 107.21(a)(1). He found that there was no violation of the FAR.

On appeal, Complainant argues that the law judge's decision is contrary to my holding in In the Matter of Waddell, FAA Order No. 90-26 (October 11, 1990), reconsideration denied, FAA Order No. 90-43 (December 24, 1990). In Waddell, the respondent argued that the gun found in her carry-on baggage was not deadly or dangerous because it was not capable of firing. I held in that case that the term "deadly or dangerous weapon" must be construed to include weapons which could appear capable of inflicting grave injuries, even if they are in fact inoperative, because "unless a gun is obviously incapable of inflicting physical harm, even such an inoperative gun could be used to attempt to hijack an aircraft." Id. at 7-8. I further held that, although all guns are presumptively deadly or dangerous weapons, once a respondent has shown that a gun is incapable of firing, it is incumbent upon Complainant to prove that the gun either is, or appears to be, operative. Id. at 10-11. See also Order Denying Reconsideration at 2-4.

As Complainant points out in its brief, the law judge in this case did not consider the question of whether the BB gun appeared to be operative, but rather, dismissed the case based on his finding that the gun was inoperative. In fact, there was unrebutted testimony from both the security screener who discovered the gun, and the checkpoint supervisor who was

called to the checkpoint to verify that a gun was found, that the BB gun appeared to be operative. Thus, Complainant met its burden of proof under Waddell by showing that, regardless of whether the gun was actually capable of firing, it appeared to be operative. Accordingly, it was error for the law judge to dismiss the case against Respondent.

One final point deserves mention. Although the law judge rested his decision on the finding that an inoperable BB gun is not a deadly or dangerous weapon, he expressed some doubt as to whether even an operational BB gun would be considered a deadly or dangerous weapon. It should be emphasized that, not only could a shot fired from a BB gun cause grave physical injury, but such a gun might also easily be mistaken for a much more powerful weapon. In short, in the context of aviation security, a BB gun must be considered a deadly or dangerous weapon.

THEREFORE, for the reasons set forth above, Complainant's appeal is granted and the law judge's initial decision is reversed. A civil penalty of $1,000 is hereby assessed.[3/]

JAMES B. BUSEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 1st day of August 1991.

3/ Unless Respondent files a petition for judicial review within 60 days of service of this decision (pursuant to 49 U.S.C. App. § 1486), this decision shall be considered an order assessing civil penalty. See 55 Fed. Reg. 27574 and 27585 (July 3, 1990) (to be codified at 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2)).